

APPLICATION FOR JUDGESHIP

Chief Water Judge

A. PERSONAL INFORMATION

1. **Full Name:** Cornelius Bruce Loble
 - a. **What name do you commonly go by:** C. Bruce Loble
2. **Birth date:** 1947 **Are you a U.S. citizen?** Yes
3. **Social Security No.:**
4. **Home Address:**
Bozeman, Montana 59715 **Phone:** (406) 587-1001
5. **Office Address:** Montana Water Court
P.O. Box 1389
Bozeman, Montana 59771-1389 **Phone:** (406) 586-4364
6. **Length of residence in Montana:** 61 years
7. **List your place of residence for the past five years:**

<u>Dates</u>	<u>City</u>	<u>State</u>
1990-2009	Bozeman	Montana

B. EDUCATIONAL BACKGROUND

8. **List the names and location of schools attended, beginning with high school:**

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Helena Sr. High	Helena, Montana	1965	Diploma
University of Montana	Missoula, Montana	1969	B.A. History & Political Science

University of Montana
School of Law Missoula, Montana 1972 J.D.

9. **List scholarships, awards, honors and citations you have received (Eagle Scout, Book Awards, Boy's or Girl's State, etc.)**

Upper Missouri Water Association: Distinguished Service Award 2002

Kiwanis International: Tablet of Honor 2004

Kiwanis International: Legion of Honor 2001

Distinguished or Outstanding Kiwanis Circle K Advisor: 1995, 1996, 1998,
2001-2004

Kiwanis International: George F. Hixson Fellow 1998

Distinguished Club President: Bozeman Kiwanis Club 1995-1996

BV Martindale-Hubbell Rating during my time in private practice
(At the time, youngest Helena lawyer so rated)

10. **Were you a member of the Law Review Board? If so, please state the title and citation of any article which was published and the subject area of the article.**

No.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

11. **List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.**

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court	1972
U. S. District Court for the District of Montana	1972

12. **Indicate your present employment (list professional partners or associates, if any).**

Chief Water Judge - Montana Water Court

Appointed by Chief Justice J. A. Turnage on May 14, 1990.

Reappointed on June 22, 1993.

Reappointed on June 23, 1997.

Appointed by Chief Justice Karla Gray on June 21, 2001

Reappointed on June 20, 2005.

13. State the name, dates and addresses of all law firms with which you have been associated in practice, and of all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Date</u>
Sole Practitioner Helena, Montana	Attorney	1986 - 1990
Loble & Pauly, P.C. P.O. Box 176 Helena, Montana 59624	Associate, Partner, Shareholder	1973 - 1986
U. S. Patent Office Washington, D.C.	Trademark Attorney	1972 - 1973

14. If you have not been employed continuously since completion of your formal education, describe what you were doing.

Not Applicable

15. Describe the nature of your present law practice, listing the major types of law you practice and the percentage each constitutes of your total practice.

The work of the Chief Water Judge is difficult to compare to a law practice, however, I will describe many of the duties and responsibilities of the job.

The Chief Water Judge is the primary administrator and arbiter of the largest and most massive lawsuit ever initiated in Montana and presides over the Montana Water Court. The Water Court currently has a biennial budget of about \$3,000,000, a staff of eleven Water Masters and six administrative staff, and limited authority over forty water resource specialists of the Department of Natural Resources and Conservation (DNRC).

There are approximately 219,000 "existing water right" claims (i.e., water rights that were appropriated under the law as it existed prior to July 1, 1973) filed in the statewide proceeding to adjudicate Montana's water rights. These claims are owned by approximately 59,000 unique entities. There is also an unknown number of federal and Indian reserved water rights which must be either quantified through settlement negotiation efforts with the Reserved Water Rights Compact Commission and eventually presented to the Water Court for its approval and incorporation into the statewide adjudication final decrees or litigated through the Water Court. See Sections 85-2-701 through 85-2-708, MCA. This large group of water users represents most of the actual litigants in Montana's statewide water rights adjudication action.

Additionally, there are over 110,000 other water users that have the potential to become litigants in the Water Court. They are the owners of post June 30, 1973 water permits, certificates, reservations, or have pending applications therefore. When the Water Court issues a decree in a basin, it is required to provide notice to all known water users within that basin, including the current owners of the "existing water right" claims within a basin (i.e., the pre July 1, 1973 water users), and all other water users with some form of a post June 30, 1973 water right.

With the resources provided by the Legislature, the DNRC and the Water Court move systematically through the 85 drainage basins of the state. After consulting with DNRC and other entities, such as the Reserved Water Rights Compact Commission, tribal and federal governments, and interested water user groups, I direct DNRC to examine claims within a specified drainage basin. Once DNRC's examination is complete, it provides a Summary Report (basically a draft decree) to the Water Court for review. Once satisfied with the Report, I authorize DNRC to issue a decree. Depending on the basin, a decree can contain several hundred to several thousand water right claims.

We prepare general findings of fact and conclusions of law and other appropriate documents needed for the basin adjudication. I assign one or two Masters to the decreed basin to resolve any objections and issue remarks and I generally supervise their work. The Masters issue Reports detailing their recommendations. After a ten-day objection period, I review, adopt, modify or reverse their recommendations, and hear most of the objections filed to the Reports.

The Chief Water Judge does not write every letter, answer every telephone call, sign every order, hold every conference, speak to every water user, hear the testimony or review the evidence presented by every litigant. We have seventeen knowledgeable, skilled, and dedicated people at the Water Court who do much of the heavy lifting to get the final product to my desk. Additionally, we are greatly assisted by the work of forty DNRC water resource specialists. We all work together to meet the goals set by the Legislature.

In pursuing those legislative goals, Water Masters do the water rights work that district judges performed some thirty years ago. However, rarely do newly hired Masters have the water law and legal experience that these district judges brought to their jobs. Therefore, all newly hired Water Masters must be trained, mentored, and supervised over a minimum period of two years to learn the basics of their craft. Each newly hired Water Master must understand the adjudication process, water law, applicable Supreme Court and Water Court precedents, and Due Process concerns. They need to be independent fact finders in their individual cases, but team players in the statewide effort to adjudicate all existing water rights. I supervise and oversee their training efforts, monitor their work, and strive to bring the right combination of consistency, predictability, and urgency to everyone's exertions.

The Chief Water Judge is the small end of a large funnel into which the Water Masters pour their reports. With few exceptions, I have read every Master's Report, considered every recommendation, and reviewed almost every water right claim touched by one of our Water Masters in the last nineteen years. I have reviewed over 25,000 water right claims. My review of these claims is usually the last opportunity to insure the quality, consistency, and accuracy of the Water Court and the DNRC's efforts, and to bring the work of all these independent fact finders into harmony. This part of the adjudication process is relentless, exacting, and time consuming. Every claim that crosses my desk represents someone's Constitutionally protected property right and no matter how many there are, each claim must be conscientiously reviewed.

Although the foregoing occupies most of my time, I have other duties as well.

Montana, the United States, and multiple Indian tribes have negotiated several reserved water right compacts which must be confirmed or rejected by the Water Court. The Court issues a decree containing the compact, notifies prospective objectors (sometimes thousands of water users), and holds hearings on the objections. I hear any objections filed to the compacts. I have reviewed and approved seven compacts.

The district courts and the DNRC are authorized to certify water right issues to the Water Court concerning the scope, validity or abandonment of water rights involved in water distribution controversies before the district courts or water right permit or change proceedings before the DNRC. Historically, I have heard most of these matters, but I have been assigning more of these tasks to our Senior Water Masters.

The remainder of my time is consumed by a variety of other matters, including attending public, judicial, and legislative meetings; appearing before the legislative Joint Appropriations Subcommittee; coordinating with the DNRC on the direction of future claims examination and the issuance of future decrees; providing reports every two months to the Environmental Quality Council (required by § 85-2-281(1), MCA); answering water related questions from judges, water commissioners, water users, and the public; generally directing the overall office policies, and performing typical administrative duties required of a supervisory position to maintain an efficient and effective working environment.

16. List other areas of law in which you have practiced, including teaching, lobbying, etc.

From 1973 to 1990, I was engaged in the general practice of law including trial, appellant and administrative work before state courts and state agencies. My primary emphasis was in the natural resources area. About 50% of my practice over those years was in the water rights and related area including the

determination of existing water rights, the pursuit of water right permits from the DNRC, water right trials before district courts and the Water Court, and participation in appeals to the Montana Supreme Court. I had a statewide practice and represented a variety of clients throughout Montana, including ranchers, individuals, water user associations and Fortune 500 companies owning ranches in Montana. By 1990, I had researched, litigated, or been involved in water right issues in over 21 Montana counties.

The remainder of my former practice involved the representation of clients before various administrative agencies of the State of Montana and local governments seeking various permits; the preparation of wills and the probate of estates; the review and preparation of agreements; involvement in domestic relations, personal injury actions, and the variety of other matters typically handled by a Montana lawyer.

While an attorney with Loble & Pauly, I actively worked on legislative matters from 1975 through 1985. During several legislative sessions I was jointly responsible for reviewing all legislative bills and preparing summaries for clients interested in the topic. I also kept track of legislative hearing schedules. In 1983 and 1985, I was active as a lobbyist for our energy, airline, and health insurance clients.

17. If you specialize in any field of law, what is your specialty?

Water Law

18. Do you regularly appear in court? Yes.

What percentage of your appearances in the past five years were in:

Federal court	0%
State or local courts of record	100%
Administrative bodies	0%
Other	0%

19. During the past five years, what percentage of your practice has been trial practice?

I don't routinely hold evidentiary trials, so the percentage is low. The eleven Water Masters work on more than 3,000 water right claims per year and, when necessary, preside over the majority of the Court's evidentiary trials. They issue Master's Reports detailing their recommendations. Following a ten-day objection period, I review, adopt, modify or reverse their recommendation and hear most of the objections filed to those reports. Most objections are submitted to me on briefs and the record. Unless the objections involve non-substantive changes or

typographical errors, I listen to the audio tape or CD recording of the hearing, often relistening to important segments of the recorded testimony several times. If necessary, I hold oral arguments on the objections.

20. How frequently have you appeared in court?

Twenty times per month on average.

21. How frequently have you appeared at administrative hearings?

0 times per month on average

22. What percentage of your practice involving litigation has been:

Civil	100%
Criminal	0%
Other	0%

23. Have you appeared before the Montana Supreme Court within the past five years? If so, please state number and the types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Within the last nineteen years, only three appeals from my work have been taken to the Montana Supreme Court. Only one of the three appeals was filed in the last five years.

In 2008, the claimant, Big Creek Lakes Reservoir Association, filed an appeal from Water Court Case No. 76HF-168, captioned in the Supreme Court as *USA v. Big Creek Lakes Reservoir Association* (Supreme Court Case No. DA 08-0134). The claimant asserted the Water Court erred in terminating its water right claim based on a finding of abandonment. On October 1, 2008, at the request of the claimant/Appellant, the Supreme Court dismissed the Notice of Appeal with prejudice. The voluntary dismissal left the Water Court decision intact. The parties were represented by the following attorneys:

United States of America: Jody Miller, Special Assistant United States Attorney, PO Box 7669, Missoula, MT 59807 (406 329-3066).

Big Creek Lakes Reservoir Association: Ronald W. Opsahl, Staff Attorney, Mountain States Legal Foundation, 2596 South Lewis Way, Lakewood, CO 80227 (303-292-2021), and
K.D. Feeback, PO Box 1715, Helena, MT 59624-1715 (406 442-8560).

Within the last five years, I have filed four petitions with the Supreme Court involving the revision of the Water Right Claim Examination Rules and Water Right Adjudication Rules. These rules are applicable to the water adjudication practices and procedures of the DNRC and the Water Court. The Supreme Court's oversight of these rules is administratively processed in Supreme Court Case No. 86-397, originally captioned as *In Re the Matter of the Activities of the Department of Natural Resources and Conservation*, but more recently re-captioned by the Supreme Court as *In Re the Matter of the Revisions to the Water Right Claim Examination Rules and the Water Court Practice and Procedure Rules*. As noted, I have filed the following petitions with the Supreme Court on behalf of the Water Court:

- 1) Petition to Revise Water Right Claim Examination Rules - December 30, 2004.
- 2) First Amended Petition to Revise Water Right Claim Examination Rules - March 11, 2006.
- 3) Second Amended Petition to Revise Water Right Claim Examination Rules (Re: Water Court Practice and Procedure Rules) - May 26, 2006.
- 4) Petition to Adopt Rules Regarding Non-Lawyer Appearances in the Water Court and Pre and Post Decree Conferences with DNRC Claim Examination Staff - February 5, 2007.

Most of the proposed revisions to the practice and procedure rules were drafted in a collaborative fashion and were acceptable to all the attorneys involved in the process. A few of the proposals were opposed by state agency lawyers, including the proposed Rules Regarding Non-Lawyer Appearances, and unauthorized practice of law issues.

With respect to the role of non-lawyers in the adjudication process and the unauthorized practice of law issues, there were sharp differences of opinion between the state attorneys representing the Attorney General, the DNRC and the Department of Fish, Wildlife & Parks ("the three state agencies") and the Water Court. On behalf of the Water Court, I researched, drafted, and proposed rules to the Supreme Court to authorize non-lawyers, such as family farm corporate officers or trustees of family trusts, to represent their family farm corporation or family trust during Water Court proceedings. The three state agencies opposed those proposed rules and argued that the Water Court should follow the same unauthorized practice of law rules applicable to the district courts. The following attorneys presented their agencies opposition:

Office of the Attorney General of Montana, Hon. Mike McGrath:

Candace West, Assistant Attorney General, PO Box 201401, Helena, MT 59620-1401. (Ms. West has since become DNRC Chief Legal Counsel, telephone 406 444-6702).

Department of Fish, Wildlife & Parks: Robert N. Lane, Chief Legal Counsel, PO Box 200701, Helena, MT 59620-0701 (telephone 406 444-4045) and G. Steven Brown, Retained Counsel, Power Block Building, Suite 4-O, 7 W. 6th Ave., Helena, MT 59601 (telephone 406-442-8712).

Department of Natural Resources and Conservation: Tim D. Hall, Chief Legal Counsel (now retired, but I believe he still works part time for the DNRC), PO Box 201601, Helena, MT 59620-1601 (telephone 406 444-6640).

The Supreme Court issued its Order on the claim examination, practice and procedure rules on December 6, 2006. With respect to the non-lawyer appearance rules and unauthorized practice of law issues, the Supreme Court devoted two of its public meetings to the issue and finally ended the debate with its Order filed March 21, 2008. In that Order, the Court adopted rules allowing non-lawyers to assist parties during the DNRC claim examination process and the Water Court's initial settlement proceedings. *See* Rule 47, W.R.C.E.R., and Rules 16 and 33, W.R.Adj.R.

On July 10, 2008, I filed Water Court Comments to Proposed Code directed primarily at the draft *ex parte* communications rules contained within the Supreme Court's Proposed 2008 Montana Code of Judicial Conduct (Cause No. AF 08-0203). In our filed Comments, I requested the Supreme Court to modify the draft rules to address the unique nature of practice at the Water Court. The final Code, adopted by the Supreme Court on December 12, 2008, contained modifications addressing the Water Court's concerns. *See* Rule 2.10(A)(3) and Comment 3 to Rule 2.10, Montana Code of Judicial Conduct.

24. State the number of jury trials you have tried to conclusion in the past ten years.

None

25. State the number of non-jury trials you have tried in the past ten years.

Seven

26. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the case caption, dates of trial, and the name and telephone number of the presiding judge. If

your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

As noted earlier, each year I review and sign orders involving thousands of water right claims per year, but preside over few trials (one within the last two years). Most of my work involves reviewing, adopting, and amending Master's Reports, and resolving objections to Master's Reports. A few representative samples of my decisions over the last two years follow.

Case WC- 2004-01 - Barrett v. Connors (Horse Prairie Creek), a water distribution controversy certified from the 5th Judicial District. Order Denying Centennial and Bar Double T Motion to Remove Claims and Order Granting Alternative Motion for More Definite Statement filed April 6, 2007. The attorneys were:

- Patti L. Rowland (406 683-8795) and John E. Bloomquist (406 443-2211), PO Box 1418, Dillon, MT 59725.
- Michael J.L. Cusick, PO Box 1288, Bozeman, MT 59771 (406 587-5511).
- Calvin J. Erb, PO Box 1366, Dillon, MT 59725 (406 683-2391).

Case 43D-172 - Order Amending and Adopting Master's Report with accompanying Dry Creek Decision, filed December 28, 2007. Several self represented parties and attorneys were involved. The attorneys active in the objections to Master's Report were:

- Marjorie Black, PO Box 684, Bozeman, MT 59771-0684 (406 582-5800)
- Alan Chase, PO Box 1355, Red Lodge, MT 59068 (406 446-2202)
- Elizabeth Scanlin, PO Box 1361, Red Lodge, MT 59608 (406 446-1016)

Case 76F-1 - Order Granting Motion to Strike and Order to Review and Revise Remark and Reexamine Claims, filed September 12, 2008. The active attorneys are:

- Michael J.L. Cusick, PO Box 1288, Bozeman, MT 59771-1288 (406 587-5511)
- Ross D. Miller, PO Box 7637, Missoula, MT 59807 (406 543-2714)
- Donald D. MacIntyre, 307 Jackson, Helena, MT 59601 (406 442-8283)
- G. Steven Brown, Power Block Ste 4-O, 7 West 6th Ave., Helena, MT 59601 (406 442-8712)
- William Schenk, PO Box 200701, Helena, MT 59620-0701 (406 444-3312)
- Candace West and Ann Yates, PO Box 201601, Helena, MT 59620 (406 444-6702)

Case 41D-1 - Notice of Conversion of Motion to Dismiss into Motions for Summary Judgment filed February 18, 2009. The active attorneys are:

- Laura Ziemer, 321 East Main St Ste 411, Bozeman, MT 59715 (406 522-7291)
- Stan Bradshaw, PO Box 412, Helena, MT 59601, (406 443-4171)
- John E. Bloomquist, Patti L. Rowland, Sarah E. Rupp, PO Box 1418, Dillon, MT 59725 (406 683-8795)

Case 40C-A1 - Decision on T7-Ranch/Goffena Claim Amendments and Order Amending T-7 Ranch/Goffena Claims, filed March 25, 2009. Self represented litigants:

- Curt Goffena (406 323-3688), Wilbur A Goffena and Susan E. Goffena (406 323-1782), 18075 Hwy 12 E, Roundup, MT 59072
- William Bergin, Box 219, Melstone, MT 59054 (406 385-2217)

Case 40C-A3 - Order Amending and Adopting Master's Report filed April 9, 2009. One attorney and one self-represented water user:

- Robert W. Snively, Attorney, 25 First Ave West, Roundup, MT 59072 (406 323-3500)
- William Bergin, self represented, Box 219, Melstone, MT 59054 (406 358-2217)

Case WC-2008-01 - *Schaff v. Krug* - Trial held November 6-7, 2008. Decision soon to be released. The attorneys involved are:

- Renee L. Coppock, PO Box 2529, Billings, MT 59103-2529 (406 252-3441)
- Page C. Dringman, PO Box 1370, Big Timber, MT 59011-1370 (406 932-0440)

27. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

None

28. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you have lectured on legal issues at Continuing Legal Education seminars or otherwise, please state the date, topic and group to which you spoke.

Speaker at 18th annual American Bar Association Water Law Conference before the ABA Section of Environment, Energy and Resources, San Diego, CA, February 24-

25, 2000, and co-author with Colleen Coyle on "Settlement in General Stream Adjudications - Fairness Standards, a Judicial Perspective."

Conference Host and Facilitator for Dividing the Waters IV, a Conference for Judges, Masters, and Referees Involved in Western General Stream Adjudications held October 1-4, 1997 in Big Sky, Montana, and speaker on topic of "How Adjudication Courts Consider and Approve Settlements of Reserved Water Rights."

Moderator of panel discussion on "Indian Water Rights Settlements"

Participant in panel discussion on "In Stream Flows"

Dividing the Waters IX: A Dialog for Judges and Masters - Jackson, Wyoming - June 9, 2005

Produced video tape and guidebook entitled "A Water Users' Guide Through the Montana Water Court" September 1995.

Continuing Legal Education seminars for State Bar of Montana:

CLE Co-Chair, "On the Water Front" and speaker, "Adjudication Issues and Update, Including Potential Conflicts of Interest" (2009)

Speaker, "Primer on New Water Court Rules" (2008)

Speaker, "Water Rights for the General Practitioner" (2008)

Speaker, "Recreation, Fish and Wildlife Water Right Claims and the Water Court" (2003)

Speaker, "Montana Water Law" (2000)

Speaker, "Water Court Dispute Resolution" (1992)

Speaker, "Water Rights Litigation" (1981)

Speaker on the topic of Senate Bill 76 which set up the current statewide water right adjudication (1980)

Real Estate Law Seminar Chair (1979) and speaker on "Unrecorded Irrigation Ditch Easements" (1979)

Continuing Legal Education speaker for Law Seminars International of Seattle, Washington:

Montana Water Law (1995)

Montana Water Law (1994)

Water law and the water right adjudication process can be mysterious, intimidating, and even frightening to some people. Educating water users, lawyers, and the public at the beginning of the adjudication activity in their community and providing periodic updates and progress reports thereafter is very important to the success of the adjudication effort. Therefore, after the Water Court issues a decree in a basin, I hold one or more "town hall" type telephone conference calls to explain the adjudication process to telephone listeners. I then hold three to six public meetings in the basin to explain the process in person and to answer questions. If the local legal community is interested, I hold "how to" adjudication CLEs. When requested, either the Water Master assigned to the basin or I, make public presentations to the local watershed groups on the progress of the adjudication in their basin. Occasionally, I also make presentations at pre-decree public meetings.

During the last nineteen years I have made at least 264 public presentations on water right topics at CLE seminars, water commissioner training seminars, before legislative committees, and before water user and other interested groups. Rather than burden this portion of the application with the entire list of lectures, I have included a list of the 77 presentations I have made since May 21, 2005 in Attachment 1.

D. PROFESSIONAL AND PUBLIC SERVICE

- 29. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.**

First Judicial District Bar Association - 1973-1990
President - 1978-1979

State Bar of Montana - 1972 to date
Chair, Section on Land and Natural Resources 1978-1982
A judicial member since 1990

American Bar Association - 1972 to date

- 30. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the past five years. Please state the title and date of any office you have held in each such organization. If you held any offices, please describe briefly your activities in the organization.**

Quest for Knowledge Club (QK) - Secretary/Treasurer 2005; President 2006

The QK Club is an association of 40 people who meet six times a year to hear and discuss papers written by a member of the group. As Secretary/Treasurer,

I arranged meeting locations, coordinated with the facility providers, scheduled the speakers and club meetings, provided notice of the meetings to the members, prepared the minutes, and collected the \$10 annual dues. As President, I hosted the club meetings, introduced the speakers, and assisted the new Secretary/Treasurer. I have presented two papers to the club and acted as a discussant on three other papers.

Bozeman Kiwanis Club:

President 1995-1996

Vice president or member of board of directors 1992-1995

Chair of Sponsored Youth Committee 1994-2009

Kiwanis Advisor to:

Bozeman High School Key Club 1995-2009

Circle K Club at Montana State University 1995-2007

Kiwanis Bulletin Editor 1992-1997

Kiwanis International Certified Trainer

Kiwanis District of Montana, Education and Training Chair 1999-2005

My activities in Kiwanis are discussed in paragraph 48.

Sons and Daughters of Montana Pioneers - President 1984-1985

This organization is composed of the ancestors of pioneers who arrived in Montana prior to 1867. During my active time with the organization, I planned and presided over some of its annual conventions, assisted the Organization to draft and successfully lobby a resolution through the Legislature to place a plaque on the Mitchell Building in Helena to recognize the Organization's donation of land on which several Capitol campus buildings are located.

31. Have you ever run for, or held, public office? If so, please give the details.

Candidate for Montana Legislature 1980

Lewis and Clark County precinct committeeman 1982-1990

E. HEALTH RECORD

32. Do you have any disabilities or impairments that might interfere with your performance of the duties of a judge? If so, please explain.

No

F. PROFESSIONAL CONDUCT AND ETHICS

- 33. Have you ever been disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.**

No

- 34. Do you know if any proceeding is pending against you before any court, the Commission on Practice of the State of Montana, Judicial Standards Commission, or by any administrative agency or disciplinary committee? If so, give the organizations.**

No

- 35. Have you ever been found guilty of contempt of court, or sanctioned by any court for any reason? If so, please explain.**

No

- 36. Do you disagree with any of the Canons of Judicial Ethics applicable to Montana Judges? If so, please explain.**

The 1963 Canons of Judicial Ethics were replaced by the Montana Code of Judicial Conduct, effective January 1, 2009. *See* Supreme Court Order dated December 12, 2008, Cause No. AF 08-0203. I do not disagree with the new Code.

- 37. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of \$100 or less was imposed unless it also included a jail sentence.**

No

- 38. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, please give the particulars, including the amounts involved.**

Unfortunately, yes. In 1984, a former client of my old law firm sued nine lawyers (of which I was one) and their three law firms. He claimed his personal injury case had been negligently handled. One of the other attorneys admitted that the case was his sole responsibility and that, if there was any negligence, it was his alone. This attorney withdrew from my old firm in 1978 and took this client and personal injury action case with him to another law firm. The client signed a Release authorizing my old law firm to transfer the case and file to the withdrawing attorney and the client recognized that the withdrawing attorney would be

representing him from 1978 forward. In 1984, the former client brought suit against all of the attorneys and three law firms who had been associated with the withdrawing attorney within the previous ten years under the theory that all the attorneys and all the law firms were vicariously liable for any negligence of the attorney responsible for the case. All of the other attorneys (including me) had little or no personal involvement in the case. Following our filing and briefing of a Motion for Summary Judgment based on the signed 1978 Release, the law suit was settled by our insurance carrier for \$25,000. The insurance carrier for the attorney primarily responsible for the case (and who withdrew from our firm in 1978) reportedly settled the case for \$200,000.

39. **Have you ever been found guilty in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.**

No

40. **Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court, that would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.**

No

G. BUSINESS AND FINANCIAL INFORMATION

41. **Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.**

No, although my brother, a cousin, and I owned some downtown Helena commercial property from 1985-1990. I managed the property as an incidental activity to my law practice. We sold the property to some of its tenants after I moved to Bozeman to become Chief Water Judge.

42. **If you are now an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment to a judicial office.**

Not Applicable.

43. **State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the past five years.**

I have not received any fees or compensation of any kind from any business enterprise or organization unless one considers interest on my joint savings account or dividends in the definition of "compensation of any kind." I have received varying interest payments and dividends totaling less than 5% of my five year total income from US Bank, Rocky Mountain Credit Union, Yum, Inc. and Pepsico Inc. The remainder of investments made during my years of private practice are in two IRAs and will not contribute to my total income until retirement. One IRA is held by USAA and the other by the Vanguard Group of mutual funds.

44. **Do you have any financial interests, investments or retainers which might conflict with the performance of your judicial duties, or which in any manner or for any reason might embarrass you? If so, please explain.**

No

45. **Have you filed appropriate tax returns as required by federal, state, local and other government authorities?**

Yes

If not, please explain. Not applicable.

46. **Do you have any liens or claims outstanding against you by the Internal Revenue Service?**

No

If yes, please explain. Not applicable.

47. **Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five (5) years? If so, please give details.**

No

48. **Please explain your philosophy of public involvement and practice of giving your time to community service.**

Public involvement and community service have always been important to me. Civic volunteers help keep communities alive, vibrant, and connected.

During my years of private practice in Helena, I was involved in several United Way and YMCA community fund drives, Salvation Army Christmas red bucket bell ringing events, Cub Scouts, judging high school speech meets, and numerous Kiwanis service projects. I was a YMCA youth soccer coach during the fall and

spring seasons for five or six years; a trustee on two cemetery associations; member and Chair of the Helena Downtown Business Improvement District Board; member of the Governor's Council on Montana Historical Records; president of the Helena Kiwanis Club (at that time, the largest Kiwanis Club in Montana); and president of the Sons and Daughters of Montana Pioneers, a statewide organization with membership around the world.

In Bozeman, all my community service is channeled through the Kiwanis organization which focuses on youth. The Bozeman Kiwanis Club is an active service group and not just a luncheon club. Although I never solicit funds for the Kiwanis Club or its service projects, I work on many of those projects and am actively involved in the organization.

For example, during the past several years, I have worked on the Kiwanis sponsored Bozeman July 4th fireworks display at the MSU football stadium as an usher and as part of the clean up crew, installed handicapped parking signs in Bozeman parking lots, served meals to the participants at the Bozeman Special Olympics regional and state games, helped set up and take down Christmas wrapping tables for the Big Brothers and Sisters organization at Bozeman's Gallatin Valley Mall, helped maintain the Kiwanis walking trail and Lindley Park Kiwanis picnic shelter, and helped wire Emily Dickinson Elementary School for computer network purposes.

Almost every Monday and many Tuesday or Wednesday evenings during the school term for the past fourteen years, I attended student meetings with the Key Club at Bozeman High School and with the Circle K Club at Montana State University as the Kiwanis advisor to those clubs. Key Club and Circle K are Kiwanis-sponsored youth service groups active at the high school and collegiate level.

I have co-ordinated and worked on several Bozeman High School Key Club's "Powder Puff" Jr. - Sr. girls' flag football games, worked on the Key Club and Circle K's Gallatin Valley Food Bank projects, helped Key Club members decorate for the Whittier Elementary School Halloween fun nights and worked on several of the school's spring carnivals, and acted as a race monitor for the Circle K's annual 5 K fun run.

As the Education and Training Chair of the Montana Kiwanis District and a Kiwanis International Certified Trainer, I have instructed, in day long seminars, about 400 Kiwanis members throughout Montana in their duties and responsibilities as incoming club presidents and secretaries.

H. WRITING SKILLS

49. **In the last five years, explain the extent you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.**

The most significant issues researched, drafted, and briefed during the last five years involved the revisions of the Water Right Claim Examination Rules, the Water Right Adjudication Rules, the role of non-lawyers in the adjudication process and unauthorized practice of law issues. As noted in paragraph 23, three state agencies opposed the Water Court's proposal on the role of non-lawyers in the adjudication process and unauthorized practice of law issues. Although most of the revisions to the Examination and Adjudication rules were collaborative, the time devoted to drafting, redrafting, and finalizing our petitions and proposed rules, and especially the contentious non-lawyer representation and practice of law portion thereof, was extensive and time consuming.

A few of the other issues I have researched over the last five years include such matters as the (1) Reserved Water Rights doctrine; (2) ownership of private stock water rights beneficially used on federal land; (3) Applicability of 1961 Groundwater Code to the United States and priority dates for wells on federal land; (4) ownership of private stock water rights beneficially used on state land; (5) standing to object to water right claims; (6) abandonment and non-perfection of water rights; (7) marshaling of water rights; (8) evidentiary weight to be assigned to Water Resource Surveys; (9) attorney conflicts of interest in water right adjudication actions; (10) forfeiture of water rights for failing to file claims; and (11) assessment of \$10,377 administrative costs and expenses against claimant due to filing of late claim, required by § 85-2-225(3)(b). One or more Water Masters helped in researching some of these issues.

In general, at least 60% of my time is spent reviewing, researching, drafting, revising, and finalizing decisions and my other legal writing. My practice from 1990 to 1999 was to research and handcraft almost all of my own decisions, but I no longer have enough time to be so self sufficient. I now generally adhere to the following triage. If I believe one of our administrative staff or a Water Master can draft an order for my signature, then I request them to do so. If I can resolve an issue with a decision that does not exceed ten or fifteen pages, then I usually research and draft it myself. An example of my sole work is found as Attachment 2. When I preside over a hearing or trial involving contested facts or legal issues, I always research and draft the decisions myself. If I am presented with extensive objections to a Master's Report, I usually ask a part time Water Master/Law Clerk to ferret through the record to advise me if there is "substantial evidence" to support the Master's decision. If a novel legal issue arises on any of my projects and I am unable to quickly find the answer, I ask a Water Master to do the research

and then I analyze the resulting conclusions. When close to completing a significant decision, I often circulate a final draft among some of the Court staff for their stylistic review.

- 50. If you have engaged in other types of "legal writing" in the last five years, such as drafting documents, etc., please explain the type and extent of writing you have done.**

On the Water Court website, www.montanacourts.org/water, we have placed documents of general information entitled, "Step-by-Step Guidebook," "Representing Yourself," and "Outline of Basic Montana Water Law." These documents represent a collaborative effort of more than one author, including my own, but the overall direction and final editing were my responsibility. As time permits, I periodically modify and update these documents.

On December 30, 2004, I filed a petition in the Montana Supreme Court to revise the Water Right Claim Examination Rules in Cause No. 86-397. These proposed rules included revisions to the Water Court Practice and Procedure Rules. Although most of the proposed modifications to the overall rules were the result of significant public comment and the product of extensive collaborative rewriting, the final version of proposed Rules 1.II(7) through 1.II(10) basically reflected my drafting.

The 2005 Legislature modeled House Bill 782 after my proposed Rules 1.II(7) and 1.II(10). House Bill 782 was overwhelmingly approved by the Legislature and is now codified at §85-2-247 and 248, MCA.

On March 11, 2006, I filed the Water Court's First Amended Petition to Revise Water Right Claim Examination Rules in the Supreme Court, Cause No. 86-397.

On May 26, 2006, I filed the Water Court's Second Amended Petition to Revise Water Right Claim Examination Rules (Re: Water Court Practice and Procedure Rules) in the Supreme Court, Cause No. 86-397.

On February 5, 2007, I filed the Water Court's Petition to Adopt Rules Regarding Non-Lawyer Appearances in the Water Court and Pre and Post Decree Conferences with DNRC Claim Examination Staff in the Supreme Court, Cause No. 86-397.

On July 10, 2008, I filed the Water Court Comments to Proposed Code in the Supreme Court, Cause No. AF 08-0203. The comments were mostly directed to proposed Rule 2.9(A)(1) of the Proposed 2008 Montana Code on Judicial Conduct regarding *ex parte* communications.

- 51. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.**

See Attachment 2: Notice of Conversion of Motion to Dismiss into Motion for Summary Judgment, Case 41D-1 filed February 18, 2009.

52. What percentage of your practice for the last five years has involved research and legal writing? 60%

53. Are you competent in the use of Westlaw and/or Lexis?

Yes. Lexis.

I. MISCELLANEOUS

54. Briefly describe your hobbies and other interests and activities.

I enjoy the typical family activities that my wife and I engage in with our respective families and our two grown children. My wife and I like to read, and to walk and talk, and during the spring and summer we spend time working in the yard. Most Saturday evenings, we play Bridge. I used to ski during non-legislative winters; fish, float rivers, do some hiking during the summers; and hunt during the fall, but as the Water Court's workload has increased, these activities have diminished or disappeared. When the weather's pleasant, I generally commute to work by bicycle. I enjoy photography and computers. I also spend time on Kiwanis service projects and Key Club activities. The Key Club members have high energy levels and it requires considerable effort to keep up with them.

55. Describe the jobs you have held during your lifetime:

My first paying job was hawking newspapers on the streets of Helena at age ten. I bought ten newspapers for a quarter and sold them for fifty cents. I later had a paper route with the Helena Independent Record in junior high school.

The summer after junior high school (1962), a friend and I were partners in a part time lawn mowing business. Mostly that summer, I pumped gas, sold fishing tackle, licenses and boating accessories at the Canyon Ferry Yacht Basin. I also did a little salvage diving and a few propeller replacements.

During my high school years (1962 - 1965), I worked part time after school and during my first summer at a Helena pharmacy. The next summer I worked at a retail cleaning products store. During my third summer, I had a weekend ice-cream novelty business on Canyon Ferry Lake. I delivered ice-cream bars by boat to tourists, anglers, and campers. During my high school summers, I also fixed fences, irrigated alfalfa, bucked bales, and stacked hay on my parent's small farm in the Helena valley.

During two of my college summers (1966 & 1967) I drove a Highway Department truck, measured the distance and width of every road and photographed every bridge in Petroleum, Yellowstone, Glacier and Lincoln counties. During part of the 1968 summer, I attended ROTC summer camp at Ft. Lewis, Washington.

During the summer of 1970, following my first year of law school, I hauled garbage, cleaned outhouses, and worked on a park maintenance crew for the Montana Fish and Game at Canyon Ferry Lake. During my second summer, I worked for Montana Legal Services in Helena. During one law school semester break, I did some work for my father's law firm on an estate.

Following my law school graduation in 1972, I entered the U.S. Army and spent three months at Fort Knox, Kentucky in Armor Officer Basic Training School learning leadership skills, armor unit tactics, maintenance of track vehicles, and how to fire large caliber weapons. During my last two weeks at Ft. Knox, I was loaned to the post JAG office and prepared wills and powers of attorney for military personnel transferring out of country. Upon completion of my military training, the Army transferred me to the Reserves and I eventually received an Honorable Discharge with a final rank as captain.

After Ft. Knox, I became a Trademark Attorney for the U.S. Patent Office in Washington, D.C. I reviewed trademark applications, researched existing trademarks and trademark law, and granted or denied the applications. In September 1973, we returned to Helena where I began practicing law. Please refer to my response to Question 16 for the synopsis of my 17 years of practicing law.

56. Please identify the nature and extent of any pro bono work that you have personally performed during the past five years.

None. I tried an experiment at our office to see if our Court's professional staff could engage in pro bono work in areas outside the Water Court's jurisdiction. One of our Water Masters represented a tenant in a landlord-tenant dispute. The presiding district judge set the matter for trial on three weeks notice. It forced the cancellation of a Water Court trial that had been set for months and ended the pro bono experiment. During my years in private practice, I usually handled one or two domestic relations cases per year for Montana Legal Services.

57. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

The people who have influenced my view of our system the most are my grandfather, Lester H. Loble, and my father, Henry Loble. My grandfather began practicing law in 1914 and had tremendous enthusiasm for life and the importance of access to the legal system. My father was an "AV" rated lawyer and an

exceptional water lawyer. He always stressed the importance of studious research, adherence to the principles of the law, and ethical behavior. Both men served as district judges in Helena's First Judicial District Court. My admiration for effective advocacy by quality lawyers and the importance of the legal system comes from these two men. They taught me, and I still believe, that the security of our rights as individuals and the functioning of our economic system is not possible without the rule of law and an independent judiciary.

I saw the law's importance early in my career when guns were drawn at my client's irrigation headgate. The only solution to anarchy on that ditch was immediate access to the judicial system for a restraining order. The restraining order did not end the animosity among the parties, but it stopped the potential for a tragic ending. To this day, I am still impressed by the results generated from a simple piece of paper signed by a district judge over fifty miles away from the headgate. Maintaining American confidence in the integrity of our system of justice is an absolute necessity for this nation.

An interesting influence on my Water Court work was generated by a letter that was on my desk when I arrived at the Water Court in 1990. In his very angry letter, a water user declared:

Frankly, these ranch lands never were meant to support a host of lawyers, bureaucrats, and politicians feeding out of our trough and adding to our miseries, such as the drought conditions we have suffered through the past few years. It's time this water court process got done up, and dried up, and off our backs, and with the assurances that we won't be further burdened with it again in the future.

I keep and regularly read this letter to remind me of the tension and difficulty that the adjudication of water rights can create for water users, many of whom appear at the Water Court without legal representation. We deal with Constitutionally protected property rights and we must always provide Due Process to water users and be sensitive to their time and economic constraints.

58. In the space provided, explain the qualities which you believe to be most important in a good judge.

A good judge possesses the same qualities as a good citizen, a good lawyer and a good scout. Honesty, integrity, impartiality, and patience are obviously essential. A good judge must have the background and intellectual ability to understand the factual and legal issues presented, and possess a common sense attitude about resolving those issues and getting the job done. Good judges need to be able to

listen, study, and evaluate conflicting facts and law, and be confident about their judgment without becoming arrogant or mean spirited.

A good water judge must have the legal and practical knowledge of the subject at issue. Water law is a unique area of the law. Much of it was repealed in 1973, but is still applicable to our work. It requires specialized legal knowledge and expertise, but it cannot be fully grasped without personal and practical experience.

In addition to the above, a good Chief Water Judge must have administrative abilities and experience in budgetary, managerial, and supervisory matters. The Chief Water Judge is responsible for the efficient expenditure of significant public funds and the effective allocation of human resources. Coordination and cooperation with the water adjudication staff and the central administration of the Department of Natural Resources and Conservation is required for the effective management of the statewide adjudication of water rights.

Finally, a good Chief Water Judge must be industrious and enthusiastic about the adjudication process, and have a clear vision on how to advance its progress and maintain the integrity of the whole. This is a long term project that requires organization, perseverance, tenacity and confidence that the ultimate goal will be reached.

59. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

I am fairly cautious in striking the balance between precedent and flexibility. Water rights are valuable property rights. Existing water rights are recognized and confirmed by the 1972 Montana Constitution in Article IX, Section 3. Those rights are defined by the laws that existed before July 1, 1973.

The Water Court's role is not to determine future water use policy. Its purpose is to adjudicate water rights in accordance with the water law statutes enacted by the Montana territorial and state legislatures as those laws have been interpreted by the Montana Supreme Court.

The Montana Supreme Court's interpretation of those statutes over the last 100 years has been fairly consistent. The major principles of Montana water law can be summarized as follows: Beneficial use forms the basis, measure, and limit of all rights to the use of water. Water is distributed on a priority system. First in time is first in right. A water system is a unitary and finite resource. Every party in a water lawsuit is an antagonist of every other party even when they are unaware of each other's use of water. The actions of one user can have an immediate and direct effect on other users. Any increase in the burden on a stream can adversely

affect other water users. The clear purpose of the statewide adjudication is to adjudicate water rights as they existed on July 1, 1973.

The statewide general adjudication involves over 219,000 claims owned by approximately 59,000 claimants. It is difficult for water users to maintain a constant vigilance over the Water Court's resolution of their neighbors' water right claims. Since the Water Court's determination of water rights, whether decided by settlement or by trial, quantifies the scope and extent of a right, and defines and sanctions the ladder of priority by which water users will receive, or won't receive, their water rights in times of scarcity, the Water Court must be very careful to follow the applicable law in determining the validity of a water right. We keep the principles of water law summarized in the earlier paragraphs always in mind.

The Legislature has instructed the Water Court to treat the over 219,000 statements of claim for water rights filed by April 30, 1982 as prima facie proof of their content. Montana citizens, through their elected officials, have made it quite clear that the security and stability of these property rights are important.

The appeal of Water Court decisions to the Montana Supreme Court is rare. I attribute a lot of that rarity to the Water Court's continued and conscientious reliance on established legal principles. Following established precedent provides predictability, certainty, and security.

Therefore, when drafting decisions that have statewide significance or which appear to have potential for an appeal, my research is extensive and the resulting opinions are drafted carefully with attention to past precedent. My job is to give the parties and the Supreme Court a well documented opinion on existing Montana water law as applied to the facts in the case. Once I provide that opinion and that interpretation of the law, I am comfortable with whatever the Supreme Court decides in the event the matter is appealed.

I do believe in exercising flexibility when procedural impediments threaten to entangle the process. The clear intent of the Montana Legislature regarding the adjudication of water rights is to accomplish the task as fast as possible, as accurately as possible, but with the least amount of injury and inconvenience to existing water right owners. Many of the water users appearing before the Court are unrepresented by counsel. As long as Due Process is afforded those affected, we will embrace innovation and flexibility in getting our job done.

However, since my decisions affect the entire state and will influence the Water Court's treatment of federal and state based water rights for years, apparently without the likelihood of very many appeals, I must be mindful of our past decisions and the affect any future decision will have on the integrity of the entire

adjudication effort. I also heed the warning issued by the United States Supreme Court when it discussed Montana and Arizona's general adjudication effort, that any state-court decision alleged to abridge federal rights can expect to receive "a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment" and that "resort to a federal forum should remain available if warranted by a significant change of circumstances..." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 3215 n. 21, 3216, 77 L.Ed. 2d 837 (1983).

Therefore, "flexible" decisions on substantive legal issues could result in a costly failure of the adjudication effort. Precedent carries a heavy weight on my scale.

60. **In the space provided, state the reasons why you are seeking judicial office. Please indicate whether the judicial salary will be an increase or decrease over your current gross income.**

My experience as Chief Water Judge over the last nineteen years has intensified my commitment to the judicial process, the effective management of the statewide adjudication of Montana water rights, and the completion of this formidable task.

Twenty-three years ago, the Montana Supreme Court stated that "[n]o more difficult task has ever been assigned by the legislature to the court system of this state." *McDonald v. State* (1986), 220 Mont. 519, 525, 722 P.2d 598,601.

Four years ago, the Legislature assigned even more tasks to the Water Court and set an expectation date that will expire within twelve years. The Legislature has presented major challenges to the Water Court and I want to help meet those challenges.

The task of managing the accelerating pace of decree issuance, resolving thousands of objections and issue remarks, educating the water user and legal community in the nuances of the water adjudication effort, and maintaining consistency in the Court's decisions will be formidable, but doable.

The Water Court is supervising the final allocation of a valuable and finite public resource. However, unlike traditional litigation, Water Court litigants are not in court because they personally want to resolve some grievance. They are in court because the Montana Legislature directed the Supreme Court to issue an order initiating unified proceedings for the general adjudication of existing water rights.

This process can be bewildering and expensive to water users. I want to help water users navigate their way through the water adjudication labyrinth as quickly and efficiently as possible and to adjudicate their water rights as accurately as the evidence and the law allows.

This is not an easy undertaking and it requires leadership and vision from someone who understands the process, the complexity of the task, the unity and relationship of Montana water resources, and recognizes that any water user who obtains a priority date or a flow rate earlier in time or greater in flow than evidence of historical beneficial use should allow, does so at the expense of unsuspecting junior water users on the source of supply. The Water Court must quantify water rights in accordance with established water law principles and not in accordance with the ebb and flow of shifting personal and political influences.

I believe that maintaining a consistent, knowledgeable, and experienced hand on the adjudication tiller as we move into the next accelerated phase of the process will benefit the entire endeavor.

My judiciary salary will remain as it is until the Legislature changes it.

61. What items or events in your career have distinguished you or of which you are most proud.

My success in representing clients in water law matters in courts across the state and before the Supreme Court from 1973 to 1990 was always very gratifying. My appointment in 1990 as Chief Water Judge to succeed Judge W.W. Lessley, a water jurist of extraordinary experience, was a high point for me.

I am proud of the Water Court and the remarkable people who work here. We are adjudicating very important property rights that belong to people who often are not thrilled with the prospect of having their water rights precisely defined. We make every effort to do our job with patience, courtesy, and skill, and to follow the law.

I have reviewed and signed orders covering over 25,000 water right claims in the past nineteen years. During that entire period, there have only been three appeals of my orders to the Montana Supreme Court. Those three appeals involved only seven of the 25,000 plus water right claims that have crossed my desk. One appeal was denied and the appellant sanctioned for taking an appeal without merit. *Swinger v. Collins* (1999), 295 Mont. 447, 984 P.2d 151. The second appeal affirmed the Water Court's actions, but the Supreme Court reversed its previous 1988 *Bean Lake I* decision. *Bean Lake III* (2002), 311 Mont 327, 55 P3d 396. The third appeal was voluntarily dismissed, leaving the Water Court's decision intact. *USA v. Big Creek Lakes Reservoir Association*, Supreme Court Case No. DA 08-0134, Order filed October 1, 2008.

Although, I am gratified that there have been so few appeals of our decisions, I recognize that in resolving thousands of water right claims over a nineteen year period, there are some water users or attorneys who may be dissatisfied with some of those decisions. Nevertheless, there have been only three occasions when parties felt themselves sufficiently aggrieved to spend their time and money on an appeal of

our decisions. The infrequency of appeals is a significant accomplishment. It reflects a general acceptance of the quality of those decisions.

This accomplishment even caught the attention of Time Magazine. In its September 16, 2002 issue, it printed an article about Montana's adjudication effort at page 58. In its lead sentences, Time stated that "Judge C. Bruce Loble has the kind of record jurists dream about. He has adjudicated 14,000 claims in Montana and has never once been reversed by the state supreme court." While personally a fun moment, the identification of the success of Montana's adjudication effort by a national magazine represents a significant event.

62. State any other pertinent information reflecting positively or adversely on you which you believe should be disclosed to the Judicial Nomination Commission.

Interviewed and featured in one national and one western regional publication:

- Courts Today, January/February 2005, pages 18-19; and
- The Water Report, April 15, 2004, pages 5-9

Co-author with Henry Loble, "The Rocky Road to Water for Energy" 52 North Dakota Law Review (Spring, 1976), Reprinted in 13 Public Land Resources Digest 334 (1976).

63. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best judicial candidate?

First, my extensive water law background, gained through 36 years of concentration in the subject, and my 19 years of judicial experience gives me a practical knowledge of water rights, adjudication law, and the day to day management of the Water Court and the adjudication effort that is beyond the scope of any other lawyer, and uniquely qualifies me to meet the challenges of this job.

Second, the passage and approval of House Bill 22 and 782 in the 2005 Legislature has had a significant effect on Montana's adjudication effort. In response to the legislative directives, the Water Court has taken the following steps:

- House Bill 22 provided much needed funding, accelerated the adjudication effort, and required the Water Court to issue decrees in all basins by 2020. To accommodate the accelerated work load, I hired five new lawyers, two new administrative staff, expanded the Court's office space, and restructured the Water Court to best utilize and integrate the strengths of all eighteen employees.
- House Bill 782 authorized and directed the Water Court to review every water right claim that has a DNRC issue remark and to resolve that issue remark even if there are no water users who find the claim to be objectionable. Section 85-2-248, MCA. The propriety and legality of the Water Court addressing legal and factual issues on its own initiative ("On its Own Motion") was controversial in the past.

Now that the Legislature has institutionalized the practice, the Water Court is implementing this policy in a sensitive and thoughtful manner to avoid potential accusations that the Water Court has become a “prosecutor” or an “activist” court seeking to destroy the property rights of Montana water users. With respect to decrees issued between 1997 and HB 782’s effective date, I have directed our staff to reopen cases and claims as necessary and to contact the water users to resolve the remarks. For decrees issued after the HB 782 effective date, we are addressing the unresolved remarks as we work our way through each new decreed basin. These issue remarks need to be resolved consistently across the state.

- My nineteen years experience in the practical day to day adjudication of water rights at the Water Court singularly qualifies me to meet the challenges created by the passage of HB 22 and HB 782, while constantly guiding the entire adjudication forward.

Third, when I first came to the Water Court in 1990, the Court was simply adjudicating water rights on paper. The “vision” I brought to the Court was to steer the adjudication towards solving practical, day to day water distribution problems. Although it has taken some time, that vision is now bearing productive fruit. Several years ago, achieving any adjudication success did not look feasible as the resources devoted to the State’s water adjudication effort were in a downward spiral.

- The DNRC claims examination effort is a crucial element in the adjudication process. In 1990, the DNRC estimated it would complete the examination of claims by the year 2003. Shortly after 2003 expired, the DNRC estimated it would take another thirty years to finish this task.
- In 1995, I recognized this unfortunate trend and concluded in my “On Motion” decision that if the adjudication had to “do more with less,” the Water Court needed to focus its primary efforts on resolving objections, because only after all the objections in a source were resolved can a water commissioner be appointed to enforce Water Court decrees. See § 3-7-212, MCA. Therefore, upon that task we focused our energies. We have achieved considerable success.
 - In 2002, we initiated the first enforcement of Water Court decrees on three sources in the 14th and 18th Judicial District Courts. One of our first enforcement efforts was on the previously un-decreed Musselshell River, a 350 mile source with 241 water rights. We devoted weeks of time and worked closely with District Judge Randal Spaulding, his staff, and Musselshell water users to successfully launch this project. Each year thereafter we have expanded the number of Water Court decrees being used by water commissioners and district judges across the State to distribute water. During the upcoming 2009 irrigation season, we anticipate Water Court decrees will be enforced on thirty-five sources in the 1st, 4th, 5th, 6th, 14th, 18th, 21st, and 22nd Judicial District Courts. Most of these water

sources are depicted on Attachment 3. About half of all the water commissioners appointed by district judges are now enforcing Water Court decrees. The district court judges appointing these commissioners are: Judges Holly Brown, Ray Dayton, Blair Jones, Jeffrey Langton, Ed McLean, Jeffrey Sherlock, Randal Spaulding, Nels Swandal, and Loren Tucker. Additionally, we have pending requests from Judges Holly Brown, Jones, Langton, Sherlock, and Tucker for Water Court tabulations on several more sources within their judicial districts, which we expect to provide within the next two or three irrigation seasons.

- In addition to helping district judges and water commissioners distribute water through a Water Court tabulation containing the proper allocation and distribution of water rights among competing water users, these projects also provide an opportunity to “test drive” Water Court decrees, so that we can find and correct problems before entering final decrees. In any human endeavor as massive as the statewide adjudication of water rights is, there are bound to be errors. Those errors range from simple typographical errors to substantive ones, and these “test drives” usually bring them to light.
- In 2001, as the Water Court was working with district courts to begin the first enforcement of Water Court decrees, the DNRC legal counsel concluded that any effort to “test drive” any decree was premature, and legally suspect or deficient. To date, not one enforcement project has been challenged as legally deficient and not one water user has sought Supreme Court review of these enforcement efforts. Instead, there has been general applause for these projects and even the Legislature has recognized their importance. In 2005, the Legislature declared in HB 22 that one of the purposes of the bill was “to ensure that the product of the adjudication is enforceable decrees.” *See* § 85-2-270(1)(c), MCA. It is my belief that the success of these enforcement projects helped generate much of the legislative and water user enthusiasm and support that lead to the expanded funding and acceleration of the adjudication effort in 2005. It became clear that the adjudication effort would produce tangible and workable results.
- During the 2007/2008 legislative interim, I recommended to the Water Policy Committee that district judges be authorized to appoint water masters to serve as special masters, with the chief water judge’s approval. The purpose of the appointment is to give the district judges access to the Water Court’s water law expertise and to assist the district courts in resolving unlawful water distribution and dissatisfied water commissioners actions in an expeditious manner. This recommendation was adopted by the interim committee, incorporated into House Bill 39, approved by the Legislature, and signed by the Governor. Before the

Governor's signature was dry, one of our water masters was appointed by District Judge Blair Jones to act as a special master in a 22nd Judicial District water commissioner action.

Fourth, my goals and "vision" at the Water Court for the past nineteen years has been to focus, streamline, and hasten the adjudication within the confines of legislative funding, to create an adjudication process that is as "user friendly" and customer oriented as our judicial system would allow, and to develop a professional and efficient adjudication staff. Additionally, I constantly look for ways to solve practical problems and sweep obstacles encountered by water users away to make their journey through this adjudication effort as smooth as possible. A few of our accomplishments follow:

- Created a central index of the Court's significant decisions on computer disk and paper copy to facilitate the search for similar factual and legal situations by water users, water lawyers, and Court staff and thereby promoting efficiency in research and increased uniformity in decisions. Recently, the Water Court's significant decision index has been placed on the Water Court website at <http://courts.mt.gov/water/> under the heading "Water Court Significant Case Search."
- Implemented a Mediation program and trained prospective water right mediators in water law and Water Court procedures, and trained water right lawyers in mediation techniques. Every two years, the Water Court provides mediation training for water commissioners. Every year, the Water Court assists the DNRC in its water commissioner training.
- Produced a video tape and guidebook entitled "A Water Users' Guide Through the Montana Water Court." The video and guidebook take water users step by step through the Water Court process and facilitates a Court atmosphere encouraging a user-friendly process. The guidebook has been modified and placed on the Water Court's website. We plan to convert the VHS videotape to a DVD in the next several months.
- Reduced Water Master turnover rate. During the nine inclusive years between 1983 and 1991, twelve Water Masters left the Court, with the average stay being two years. When I arrived at the Water Court in 1990, one Water Master was approaching six years experience, but the rest had two years or less experience. During the seventeen inclusive years between 1992 to 2009, only six Masters have left the Court. Five of our current eleven Water Masters have ten, seventeen, or twenty-five years of experience with the Water Court. The more experienced our work force becomes, the more accurate the adjudication will be, and the faster we will achieve the Legislature's goals.

- Embraced advanced technology to increase adjudication productivity. In 1991, I requested funds from the Legislature to buy a ten computer network system for the Court. When it arrived, our professional staff stopped hand writing their Master's Report for later transcription. When broadband internet access became available, we obtained office wide computer access to the DNRC's water rights database in Helena. We purchased high speed digital photocopiers and scanners and now provide digitized information to the public through e-mail attachments and CDs. In addition to web based information, we now provide free CDs containing digital copies of Water Court decrees, decree indices, and forms to water users, lawyers, and consultants. I maintain an email list of 57 lawyers, consultants, water users, and legislative staff and provide them with an early warning of Water Court activities. Recently, I initiated "town hall" type public meeting telephone conference calls to provide information on Water Court information to the public. These conference calls often provide enough information to save water users the time and expense of traveling to our in person, basin public meetings. These conferences have been greatly appreciated by water users who are out of state when the public meetings are held.
- From 1990 through 2004, an inclusive period of fifteen years, we issued thirteen decrees involving 36,613 claims in the following twelve drainage basins: the lower Musselshell River, the Ruby River; the Bitterroot River; the Clarks Fork of the Yellowstone River; the Milk River below Beaver Creek; the Missouri River from Three Forks to Holter Dam; the Yellowstone River between the Clarks Fork and the Bighorn Rivers; the Missouri River below Fort Peck dam; the Poplar River; Big Sandy Creek; the Yellowstone River between the Bighorn and Tongue Rivers.
- In the four plus years from 2005 through March 20, 2009, due to the additional resources provided by HB 22, we issued seven more decrees involving 17,842 claims in the following seven drainage basins: Teton River; Union Creek; Big Hole River; Missouri River from Holter Dam to the Sun River; Tongue River including Hanging Woman Creek; Tongue River below Hanging Woman Creek; and Beaver Creek, a tributary of the Milk River.
- From 1994 through 2003, we issued seven decrees involving the following federal and Indian reserved water right compacts: Northern Cheyenne, Fort Peck, National Park Service, Rocky Boy's, Benton Lake Wildlife Refuge, Red Rock Lakes Wildlife Refuge, and Black Coulee Wildlife Refuge. I approved all seven compacts.
- In 2008 and 2009, we issued two decrees involving the following federal water right compacts: United States Forest Service and the United States Bureau of Land Management. The Forest Service Compact has received objections. The objection period for the BLM Compact expires on September 2, 2009.

- After extensive review and public comment, the Water Court and DNRC adjudication staff revised the Water Right Claim Examination Rules that were last amended by the Supreme Court in 1991. Following the filing of my petitions, and additional briefing and public comment, the Supreme Court updated and revised the Water Right Claim Examination Rules applicable to the DNRC and the Water Right Adjudication Rules applicable to the Water Court. *See* Supreme Court Order of December 6, 2006.
- Several of my decisions, rendered earlier in contested proceedings, have now become so accepted that their holdings were incorporated either into the Water Right Adjudication Rules without objection or into statute with nominal legislative opposition. *See*, for example:
 - Rule 8, W.R.Adj.R., recognizing the Water Court's authority to call claims in on its "own motion." *See* "On Motion" Memorandum, Case WC-92-3, filed February 8, 1995, in which I held the Water Court had the authority to review claims on its own initiative.
 - Rule 17, W.R.Adj.R., requiring all settlements to be approved by the Water Court and all stipulated expansions of claims to be supported by evidence to be filed with the stipulation. *See* Memorandum on Anderson and Harms Amended Stipulation, Case WC-90-1, filed September 7, 2000, in which I held that all stipulations filed with the Water Court were subject to the Water Court's approval and that any stipulated expansion of a claim required evidence of the historical beneficial use of the stipulated expansion to be filed and approved by the Court.
 - Rule 19, W.R.Adj.R., defining the burden of proof in the Water Court. *See*, Memorandum Opinion, Case 40G-2, filed March 11, 1997, in which I analyzed the legal effect of the "prima facie proof" statute and defined the burden of proof which objectors (including claimants objecting to their own claims) needed to overcome to modify water right claims.
 - Section 85-2-248, MCA, authorizing and directing the Water Court to resolve all DNRC issue remarks, even if no other water user objected to the claim. *See* "On Motion" Memorandum, Case WC-92-3, filed February 8, 1995, in which I held the Court had the authority to review claims on its own initiative.
- Following my petitions and comments to the Supreme Court regarding unauthorized practice of law issues, non-lawyer assistance, and *ex parte* communication issues, the Supreme Court generally agreed with my "Petition to the extent that it would allow for non-lawyer assistance during the administrative review process and during

the initial settlement proceedings before the Water Court.” The Supreme Court has adopted rules which recognize “the unique nature of the Water Court proceedings” and expressly allowed water judges and our staff to “assume a more interactive role with parties . . . and others.” See Supreme Court Orders dated March 21, 2008 and December 18, 2008. The Court’s recognition of the unique nature of the Water Court process and the adoption of these special practice rules will help water users resolve their Water Court issues quicker and with less expense than if the rules were not adopted.

- Over the last few years, I have developed a fairly intensive quality control and review process to find errors and maintain consistency in our work product before it leaves our doors.
- The mutual relationship between the DNRC and Water Court, once quite adversarial, has now become more respectful and collaborative. Staff from both entities meet regularly, participate in each other’s training exercises, and search for and communicate constructively in finding errors in the adjudication work product.

Fifth, I am well aware of the concerns that Water Court litigants have over the time, burdens and expense involved in the adjudication process. I know that the prudent expenditure of scarce public and private resources is extremely important.

Finally, the Chief Water Judge should be someone who has credibility based on past water right accomplishments. Such a person will thus instill confidence in the public that the water adjudication program will achieve its purpose. I believe I am that person.

J. CERTIFICATE OF APPLICANT

I understand the submission of this application expresses my willingness to accept appointment to the Judiciary of the State of Montana, if tendered by the Governor or the Montana Supreme Court, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Canons of Judicial Ethics, if appointed.

April 29, 2009

(Date)

C. Bruce Loble

C. Bruce Loble

Attachment One to Application for Chief Water Judge

Seventy-Seven Presentations by C. Bruce Loble

May 21, 2005 Through April 23, 2009

Montana Outdoor Science School - "Water & Barb Wire" - Bozeman
 May 21, 2005
 Dividing the Waters IX: A Dialog for Judges and Masters - Jackson, Wyoming
 Moderator of panel discussion on "Indian Water Rights Settlements"
 Participant in panel discussion on "In Stream Flows"
 June 9, 2005
 DNRC Claims Examiner Boot Camp - Helena
 Water Law, Adjudication History, Water Court procedures (3 classes, total 12 hours)
 July 8 and 9, 2005
 Environmental Quality Council, Montana Legislature - Helena
 September 16, 2005
 Resource Indemnity Trust Subcommittee (HJR 36), Montana Legislature - Helena
 October 5, 2005
 Yellowstone River (Basin 42KJ Decree)
 Public Meeting re: Notice of Intent to Appear - Basin 42KJ Decree
 December 1, 2005, Forsyth, Montana
 Resource Indemnity Trust Subcommittee (HJR 36), Montana Legislature - Helena
 December 5, 2005
 Montana Stockgrowers Association - Land Use and Environmental Committee - Billings
 December 8, 2005
 Teton River Watershed Group annual meeting - Dutton
 January 17, 2006
 Montana Water Resources Association Annual Conference - Fairmont
 January 26, 2006
 Environmental Quality Council, Montana Legislature - Helena
 January 27, 2006
 Bozeman Kiwanis Club - Bozeman
 February 6, 2006
 Meagher County Conservation District Winter Seminar, White Sulphur Springs
 February 13, 2006
 Water Commissioner Training Seminar - DNRC, Helena
 April 6, 2006
 Teton River Public Meeting Re: Issuance of Basin 41O Decree - Dutton
 April 11, 2006
 Union Creek Public Meeting Re: Issuance of Basin 76FA Decree - Potomac
 April 27, 2006
 Upper Yellowstone River Watershed Basin meeting - Emigrant
 May 4, 2006
 Environmental Quality Council, Montana Legislature - Helena
 May 19, 2006
 West Gallatin Water Users' Spring Meeting - 18th Judicial District - Bozeman
 May 24, 2006
 Big Hole Watershed Committee - Divide
 June 21, 2006

Montana Cattlemen's Association - Ox Bow Ranch - Wolf Creek
July 14, 2006

Environmental Quality Council, Montana Legislature - Helena
July 18, 2006

DNRC Regional Managers' Meeting - Bozeman
September 18, 2006

DNRC Adjudication Workshop - Helena
September 28, 2006

KUSM Public Television - "Montana AG Live"
October 1, 2006 broadcast

West Gallatin Water Users' Fall Meeting - 18th Judicial District - Bozeman
October 25, 2006

Montana Legislature - Joint Senate & House Natural Resources Committees
January 5, 2007

Granite Headwaters Watershed Meeting - Phillipsburg
January 17, 2007

Union Creek Public Meeting - Basin 76FA Decree -NOIA Meeting - Potomac
April 27, 2006

University of Montana School of Law - Water Law class
April 13, 2007

West Gallatin Water Users' Spring Meeting - 18th Judicial District - Bozeman
May 31, 2007

Big Hole River Public Meeting re: Issuance of Basin 41D Decree - Divide
June 6, 2007

Big Hole River Public Meeting re: Issuance of Basin 41D Decree - Wisdom
June 20, 2007

Environmental Quality Council, Montana Legislature - Helena (Telecon)
June 28, 2007

Madison Valley Water Summit - Ennis
July 17, 2007

Environmental Quality Council, Montana Legislature - Helena (Telecon)
September 14, 2007

Expert Witness Training for DNRC Claims Examiners - Helena
September 19, 2007

Water Policy Interim Committee - Choteau
October 24, 2007

West Gallatin Water Users' Fall Meeting - 18th Judicial District - Bozeman
November 8, 2007

Montana Water Resources Association Annual Conference - Fairmont
February 7, 2008

Conference with Water Attorneys on Water Adjudication Acceleration-Fairmont Hot Springs
February 14, 2008

CLE Institute, State Bar of Montana - Water Rights for General Practitioner
February 15, 2008 - Fairmont Hot Springs

CLE Institute, State Bar of Montana - Water Court Rules - Great Falls
 March 7, 2008
 Environmental Quality Council, Montana Legislature - Helena (Telecon)
 March 11, 2008
 Spring Law Clerk Conference - Bozeman
 March 21, 2008
 Missouri River Public Meeting re: Issuance of Basin 41QJ Decree - Cascade
 April 10, 2008
 University of Montana School of Law - Water Law class
 April 23, 2008
 West Gallatin Water Users' Spring Meeting - 18th Judicial District - Bozeman
 April 24, 2008
 Water Policy Interim Committee - Helena
 April 29, 2008
 Tongue River Public Meeting re: Issuance of Basins 42B & 42C Decrees - Ashland
 May 7, 2008
 Tongue River Attorneys' CLE re: Issuance of Basins 42B & 42C Decrees - Miles City
 May 8, 2008
 Tongue River Public Meeting re: Issuance of Basins 42B & 42C Decrees - Ashland
 May 8, 2008
 Big Hole River Public Meeting re: Basin 41D Decree Counterobjections - Divide
 June 4, 2008
 Big Hole River Public Meeting re: Basin 41D Decree Counterobjections - Wisdom
 June 18, 2008
 Forest Service Compact Public Meeting - Billings
 July 14, 2008
 Environmental Quality Council, Montana Legislature - Helena (Telecon from Roundup)
 July 15, 2008
 Forest Service Compact Public Meeting - Lewistown
 July 15, 2008
 Forest Service Compact Public Meeting - Dillon
 July 16, 2008
 Forest Service Compact Public Meeting - Kalispell
 July 17, 2008
 Forest Service Compact Public Meeting - Missoula
 July 18, 2008
 Adjudication Workshop for DNRC Examiners - Bozeman
 July 22, 2008
 Forest Service Compact Public Meeting - Bozeman
 July 22, 2008
 Adjudication Workshop for DNRC Examiners - Bozeman
 July 24, 2008
 Adjudication Workshop for DNRC Examiners - Bozeman
 August 20, 2008

Adjudication Workshop for DNRC Examiners - Bozeman
August 22, 2008
Environmental Quality Council, Montana Legislature - Helena (Telecon)
September 9, 2008
DNRC Adjudication Advanced Boot Camp - Fort Harrison, Helena
September 23, 2008
Big Hole River Public Meeting (Teleconference) re: Basin 41D Decree NOIA
January 6, 2009
Missouri River Public Meeting (Teleconference) re: Basin 41QJ Decree Counterobjections -
January 15, 2009
Missouri River Public Meeting re: Basin 41QJ Counterobjections - Cascade
January 15, 2009
Young Ag Couples Conference - Great Northern - Helena - "Water Rights"
January 16, 2009
CLE Institute, State Bar of Montana - "On the Water Front"
January 30, 2009 - Bozeman
Montana Chapter of the American Society of Farm Managers & Rural Appraisers
February 4, 2009 - Bozeman
Missouri River Public Meeting (Teleconf) re: Basin 41QJ Decree Notice of Intent to Appear
April 7, 2009
West Gallatin Water Users' Spring Meeting - 18th Judicial District - Bozeman
April 9, 2009
Missouri River Public Meeting re: Basin 41QJ Decree - Notice of Intent to Appear - Cascade
April 14, 2009
Tongue River Public Meeting (Teleconf) Basin 42B & 42C Decrees - Counterobjections
April 23, 2009

Attachment Two to Application for Chief Water Judge

Writing Sample (Six pages):

**Notice of Conversion of Motion to Dismiss into Motion for Summary Judgment,
Order Setting Briefing Schedule, and
Order Updating Caption and Service List**

Case No. 41D-1 filed February 18, 2009

C. Bruce Loble, Chief Water Judge

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax (406) 522-4131

FILED

FEB 18 2009

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION - BIG HOLE RIVER BASIN (41D)

CLAIMANTS: Beaverhead Water Company;
Garrison Ranches Inc; Paul H Cleary Jr Trust

OBJECTOR: Montana Trout Unlimited

NOIA: Kenefick Ranches

CASE NO. 41D-1

41D 119090-00	41D 119117-00
41D 119094-00	41D 119118-00
41D 119095-00	41D 119119-00
41D 119098-00	41D 119120-00
41D 119100-00	41D 119121-00
41D 119102-00	41D 119122-00
41D 119104-00	41D 119123-00
41D 119105-00	41D 119124-00
41D 119106-00	41D 119125-00
41D 119107-00	41D 119126-00
41D 119108-00	41D 119127-00
41D 119109-00	41D 119128-00
41D 119110-00	41D 119129-00
41D 119111-00	41D 119130-00
41D 119112-00	41D 195071-00
41D 119113-00	41D 195072-00
41D 119114-00	41D 195073-00
41D 119115-00	41D 216099-00
41D 119116-00	

**NOTICE OF CONVERSION OF MOTION TO DISMISS INTO
MOTION FOR SUMMARY JUDGMENT,
ORDER SETTING BRIEFING SCHEDULE,
AND
ORDER UPDATING CAPTION AND SERVICE LIST**

Background Proceedings

On March 31, 2008, Montana Trout Unlimited ("TU"), through its attorneys Laura Ziemer and Stan Bradshaw, filed Notices of Objection and Requests for Hearing ("TU Objections") with respect to the above-captioned claims.

On May 15, 2008, Claimants Beaverhead Water Company, Garrison Ranches, Inc., and Paul H. Cleary Jr. Trust, through their attorneys John E. Bloomquist, Patti L. Rowland, and Sarah E. Rupp, filed a Motion to Dismiss Objections or, in the Alternative, Motion for More Definite Statement and Brief in Support, with respect to TU's Objections. Response and Reply briefs were filed.

On July 16, 2008, the Court consolidated the above captioned claims into Case 41D-1 to address the issues raised in the Motion to Dismiss. Although claim 41D 119116-00, bolded in the above caption, was identified in the body of the consolidation order, the claim was left out of the caption. It is now inserted.

On July 31, 2008, a First Status Conference was held. During this conference, the Court discussed its concern of whether it could resolve the issues raised in the Motion under Rule 12(b)(6), M.R.Civ.P. or whether it was required to convert the Motion into a Motion for Summary Judgment under Rule 56, M.R.Civ.P., as matters outside the pleadings were presented to the Court.

Resolution of the issues raised in the Motion were delayed until expiration of the Notice of Intent to Appear (NOIA) deadline in Basin 41D. That deadline expired on February 3, 2009.

On January 20, 2009, Ed Kilwien, Jr., through attorney Cindy E. Younkin, filed an NOIA on claims 41D 195072-00 and 41D 195703-00. The reason for the filing, identified in paragraph 6 of the NOIA, was for "[m]onitoring objections made by others to make sure any changes resulting therefrom are consistent with historic use, and do not adversely affect appearing party." Although the stated purpose of the NOIA does not appear to include any intention to appear in support or opposition to the Motions to Dismiss filed in this Case, attorney Younkin will be added to the service list in this Case to allow Ed Kilwien, Jr., to monitor the resolution of the Motion to Dismiss issues.

On February 2, 2009, Kenefick Ranches, through attorney Elena J. Zlatnik, filed an NOIA specifically in Case 41D-1. The reason for the filing, identified in paragraph 6 of the NOIA, was that “[t]he resolutions of the legal issues in this matter will affect similar issues involving Kenefick Ranches’ claims.” Attorney Zlatnik will be added to the service list in this Case and Kenefick Ranches will be identified in the caption.

A copy of the Court’s entire Case 41D-1 case file, including the Motions to Dismiss and the briefs previously filed by the parties, will be scanned and emailed to attorney Zlatnik. Kenefick Ranches will be given about thirty days to review the Motion and the briefs and take one of the following three options: 1) Adopt the position and briefs of TU or the Claimants, 2) File a brief supporting the position of TU or the Claimants, or 3) Take no action and simply monitor the proceedings.

If Kenefick Ranches simply adopts the position of TU or the Claimants (option 1) or takes no action (option 3), then no further reply brief is necessary. If Kenefick Ranches files a brief (option 2), it would be most helpful if the brief adds value and substance to the previously filed briefs and does not, as a practical matter, simply adopt the previous briefs through the recitation or rearrangement of the articulated arguments and authorities contained in those previously filed briefs. If Kenefick Ranches files a brief supporting the Claimants’ position, then TU may file a reply brief. If Kenefick Ranches files a brief supporting TU’s position, then the Claimants may file a reply brief.

Conversion of Motion to Dismiss into Motion for Summary Judgment

The Court cannot resolve the issues raised in the Motion to Dismiss unless it converts the Claimants’ Motion to Dismiss into a Motion for Summary Judgment. In *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, 337 Mont. 339, 160 P.3d 552, ¶ 15, the Montana Supreme Court stated “Rule 12(b)(6) allows the district court to examine only whether a ‘claim has been adequately stated in the complaint.’ [Citation omitted.] As a result, the court is limited to an examination of the contents of the complaint in

making its determination of adequacy.” The “complaint” in the context of this proceeding is TU’s “Notice of Objection and Request for Hearing.”

In their Motion to Dismiss, the Claimants argue that TU does not have standing to file objections because it is not a person named in the decree, is not a division of the Department of Natural Resources and Conservation, is not a person entitled to notice under § 85-2-232(1), MCA, is not a claimant of an existing right in the basin, is not a purchaser under contract for deed for property in connection with a claim of existing right, nor the applicant or holder of a beneficial water use permit or a water reservation. Motion to Dismiss at 5-6. Proof of these assertions is not contained within the “contents” of TU’s Objections.

TU counters by arguing that a valid objection may be filed by an objector “entitled to receive notice under 85-2-232(1),” that it is an interested party and entitled to receive notice under § 85-2-232(1)(f)(a)(iii), MCA, and that it actually received notice. TU Response at 2. Copies of Water Court emails were attached to TU’s Response together with affidavits from Harry Murphy and Bruce Farling. Again, proof of the assertions contained in the TU brief and attachments is not contained within the “contents” of TU’s Objections.

Although courts have discretion to include or exclude matters presented to it that are outside the pleadings when considering a motion to dismiss, if a court “chooses to include matters outside of the pleadings, it *must* treat the motion as a motion for summary judgment under Rule 56 and provide notice to the parties of its intention to do so.” *Meagher* at ¶ 16 (italics in original).

In the Supreme Court decision of *Plouffe v. State, Dept. of Justice*, 2003 MT 62, 314 Mont. 413, 66 P.3d 316 ¶ 12, the Court rejected an argument which contended that when ruling on a motion to dismiss, a court could take judicial notice of exhibits attached to a reply brief, without converting the motion into one for summary judgment. In

rejecting this argument, the Court again stated that the lower court's "examination is limited to the content of the complaint." *Id.* The *Plouffe* decision further stated at ¶ 16 that: "[w]e decline to make an exception for facts such as those in this case which may be judicially noticed. Judicial notice in this matter involves taking notice of 'matters outside the pleading,' as explained in Rule 12(b), M.R.Civ.P. The rule expressly mandates that in such an event all parties should have an opportunity to present additional evidence. Judicial notice cannot circumvent the notice requirements in Rule 12(b), M.R.Civ.P., in this case."

The parties appear to rely heavily on facts and representation not contained within TU's Objections. The Court will need to consider these matters if it is to resolve the presented issues and the only way it can do that is to convert Claimants' motion into one for summary judgment. Accordingly, the parties are notified that Claimants' Motion to Dismiss has been converted into a Motion for Summary Judgment.

In *Cole v. Flathead County* (1989), 236 Mont. 412, 419, 771 P.2d 97, the Supreme Court held that "unless the right to hearing on a Rule 56 motion is specifically waived by all the parties . . . either the movant or the adverse parties are entitled to a hearing under Rule 56 in the ordinary case."

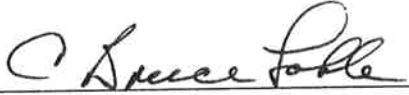
Upon completion of the briefing, the Court will schedule a Rule 56, M.R.Civ.P. hearing in Dillon, unless the parties file a specific waiver of the hearing opportunity and consent to the Court accepting Claimants' and TU's assertions as true, and further waive any objection to the Court relying on the attachments to TU's briefs. The voluntary filing of such a waiver and consent would close the record, and consent to the Court issuing a ruling on the Motion to Dismiss on the record existing at the date the waiver and consent was filed, and without the presentation of additional evidence and without a Rule 56 hearing. Alternatively, the parties could file a set of agreed facts and then waive the opportunity to present further evidence and to appear at a Rule 56 hearing. Accordingly, it is

ORDERED that Claimants' Motion to Dismiss is converted into a Motion for Summary Judgment.

ORDERED that on or before **March 20, 2009**, Kenefick Ranches shall notify the Court in writing whether it adopts the position of the Claimants or the position of TU, or whether it filed its NOIA simply to monitor the proceedings. At Kenefick Ranches' option, it may file a brief supporting or opposing the Claimants or TU. The Claimants or TU, whichever is applicable, may file an optional reply brief in accordance with Rule 2, Uniform District Court Rules.

ORDERED that Kenefick Ranches is added to the caption and attorneys Zlatnik and Younkin are added to the service list.

DATED this *18* day of February, 2009.


C. Bruce Loble
Chief Water Judge

Laura Ziemer
Attorney at Law
321 East Main St Ste 411
Bozeman MT 59715

Stan Bradshaw
Attorney at Law
PO Box 412
Helena MT 59601

John E Bloomquist
Patti L Rowland
Sarah E Rupp
Attorneys at Law
PO Box 1418
Dillon MT 59725

Cindy E Younkin
Attorney at Law
PO Box 1288
Bozeman MT 59771-1288

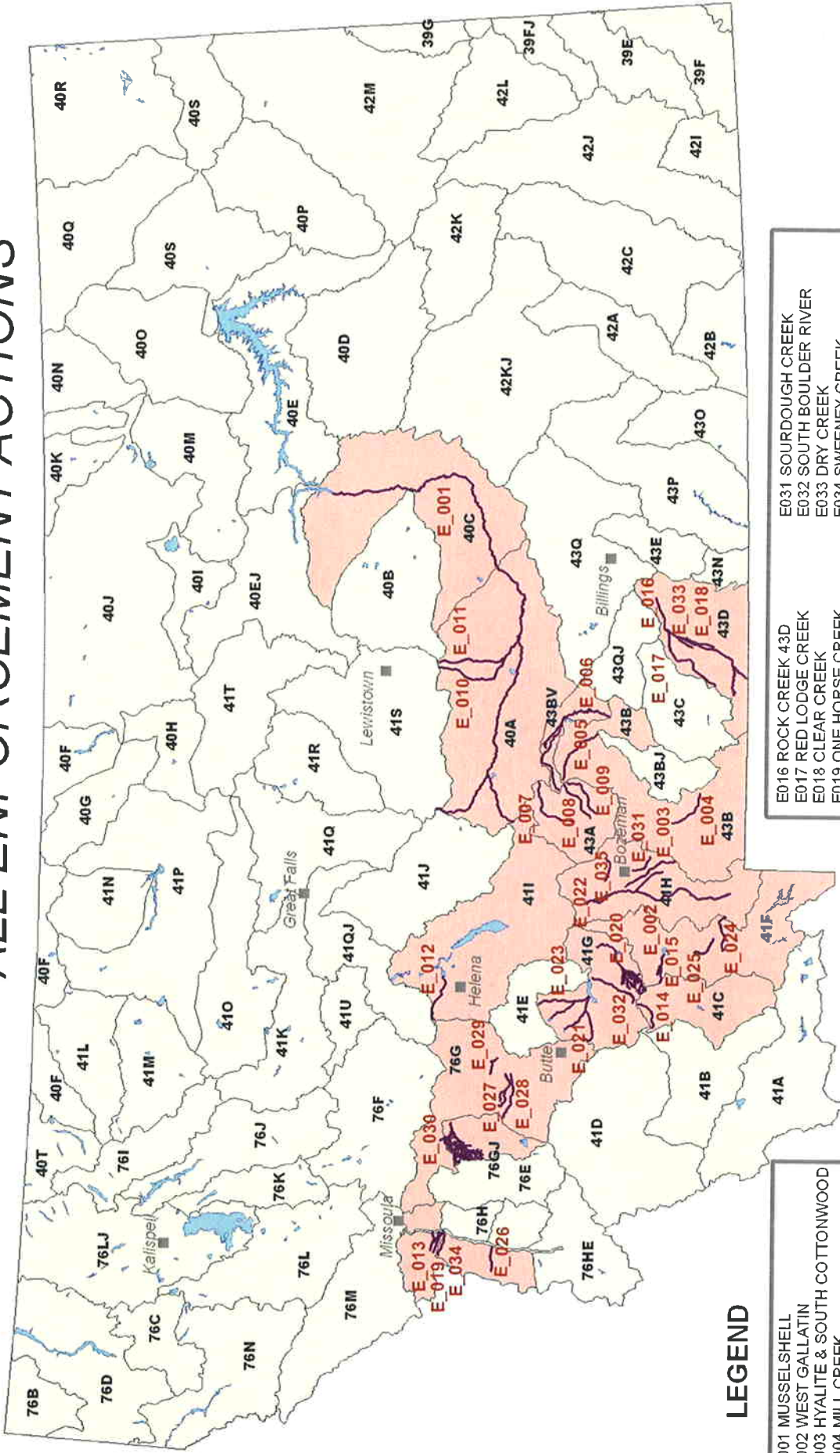
Elena J Zlatnik
Attorney at Law
PO Box 7909
Missoula MT 59807-7909

Attachment Three to Application for Chief Water Judge

C. Bruce Loble, Chief Water Judge

Map Depicting Administration of Water Court Decrees

ALL ENFORCEMENT ACTIONS



LEGEND

- E001 MUSSELSHELL
- E002 WEST GALLATIN
- E003 HYALITE & SOUTH COTTONWOOD
- E004 MILL CREEK
- E005 BIG TIMBER CREEK
- E006 SWEET GRASS CREEK
- E007 SHIELDS RIVER
- E008 COTTONWOOD CREEK
- E009 ROCK CREEK 43A
- E010 CARELESS CREEK
- E011 SWIMMING WOMAN CREEK
- E012 SILVER CREEK
- E013 CARLTON CREEK
- E014 WISCONSIN CREEK
- E015 SOUTH MEADOW CREEK

- E016 ROCK CREEK 43D
- E017 RED LODGE CREEK
- E018 CLEAR CREEK
- E019 ONE HORSE CREEK
- E020 WILLOW CREEK
- E021 PIPESTONE & LITTLE PIPESTONE CREEK
- E022 BAKER CREEK
- E023 WHITTAIL DEER CREEK
- E024 INDIAN CREEK
- E025 BEAR CREEK
- E026 SHEAFMAN CREEK
- E027 DEMPSEY CREEK
- E028 RACETRACK CREEK
- E029 COTTONWOOD CREEK 76G
- E030 LOWER WILLOW CREEK
- E031 SOURDOUGH CREEK
- E032 SOUTH BOULDER RIVER
- E033 DRY CREEK
- E034 SWEENEY CREEK
- E035 MIDDLE COTTONWOOD CREEK